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F I L E D

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No. ~~94-1709~~ APR 27 1995

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In the

Supreme Court of the United States

October Term, 1994

GEORGE SILANO, by and on behalf of himself and the high school students in the Sag Harbor Union Free School District,
Petitioner,

- vs. -

SAG HARBOR UNION FREE SCHOOL DISTRICT BOARD OF EDUCATION, SUPERINTENDENT DR. THOMAS ROY individually and in his official capacity as Superintendent, PATRICIA BRANDT individually and in her official capacity as President of the Board of Education, and THOMAS HORN, JR. individually and in his official capacity as Vice President of the Board of Education,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

School Board member Silano was invited to lecture tenth graders about his filmmaking career. When explaining the "persistence of vision" phenomenon in his film "Recess", Silano passed around 6 tiny 35mm film clips, one of which showed two women and one man unclothed from the waist up in a posed "Birth Scene" which artistically demonstrated gender equality from the first moment of life. He never used the clip again when notified not to. Although there was no significant harm to any student, the School Superintendent banned Silano from campus for the semester. The Board retaliated in his absence by promulgating a formal censure resolution and restraining future speech.

The questions for review are:

1. Does the First Amendment of the United States Constitution prohibit a school district's "post-publication retaliation" against non-employees for their speech without advance "pre-publication" notice of some sort of a speech prohibition?

2. If non-employees' rights are the same as teachers', does the Constitution prohibit a school district's "post-publication retaliation" against teachers without some type of "pre-publication notice" of what classroom speech is prohibited?

3. Does the First Amendment prohibit retaliation for public officials' speech when the government has not first communicated any limitation on such type of speech in advance of the publication?

4. Does the First Amendment include protection for non-literary artistic speech which is embodied in a fixed tangible medium of expression and is presented or provided with or without verbal commentary in the classroom?

5. Does the state have a compelling interest in promoting the Judeo-Christian religious ethic over the irreligious gender equality ethic which teaches that female breasts need not always be equated with sexuality in every instance?

6. Are the civil rights of an elected public official violated when his fellow board members deny him access to the sovereign's facilities on a co-equal basis as they grant themselves, thereby effecting a de facto taking of rights granted by the electorate?

7. Was summary judgment improperly granted "with prejudice" as a matter of state and federal constitutional law in a 42 U.S.C. § 1983 action where the district court ignored the state precedent, ignored plaintiffs' showing of pretext, and denied meaningful discovery concerning Respondents' actual motivation for the excessive sanctions imposed against a duly elected public official which demonstrated no nexus to the governmental interest in mere "curriculum control"?

LIST OF PARTIES

The parties to the proceedings are:

Petitioner:

GEORGE SILANO, by and on behalf of himself and the high school students in the Sag Harbor Union Free School District

Respondents:

SAG HARBOR UNION FREE SCHOOL DISTRICT BOARD OF EDUCATION, SUPERINTENDENT DR. THOMAS ROY individually and in his official capacity as Superintendent, PATRICIA BRANDT individually and in her official capacity as President of the Board of Education, and THOMAS HORN, JR. individually and his official capacity as Vice President of the Board of Education

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OPINIONS BELOW

The decision and final judgment of the United States District Court for the Eastern District of New York dismissing Petitioner's civil rights claims are unreported. (App. B,D). The opinion of the Second Circuit Court of Appeals which is sought to be reviewed is reported. *Silano v. Sag Harbor, et al.*, 42 F. 3d 719 (2nd Cir. 1995) (App. A-1).

STATEMENT OF JURISDICTION

This Court's jurisdiction to review a judgment of the United States Court of Appeals for the Second Circuit, affirming the district court's dismissal on summary judgment, is invoked pursuant to 28 U.S.C. §1254(1).

Petitioner brought this case in the United States District Court for the Eastern District of New York pursuant to 42 U.S.C. §1983 and 28 U.S.C. §1331. A final judgment in Respondents' favor was entered on December 20, 1993. Petitioner filed a timely notice of appeal to the Second Circuit on January 7, 1994. Title 28 U.S.C. §1291 provided federal appellate jurisdiction over the final judgment of the district court.

On December 8, 1994, the Court of Appeals affirmed the district court's opinion finding that Respondents' censure resolution and visitation ban did not violate Silano's constitutional rights

and an immunity defense was properly interposed by the individual defendants. On December 14, 1994, Petitioner filed a timely petition in the Court of Appeals for rehearing and certification to this Court under Rule 19.[1] The petition for rehearing was denied on January 27, 1995. This Petition for Writ of Certiorari is timely filed within 90 days of January 27th, by April 27, 1995.

STATUTES INVOLVED

United States Constitution, Amend. I provides in pertinent part: "Congress shall make no law ...abridging the freedom of speech..."

42 U.S.C. §1983, provides in pertinent part: "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State ... subjects, or causes to be subjected, any citizen of the United States ... to the deprivation of any right, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, ..."

Sag Harbor Union Free School District Board Resolution and Executive Order:

Reproduced in Appendix (App. G,F)

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[1]Two members of the panel (Judges McLaughlin and Van Graafeiland) were also reconsidering the First Amendment retaliation in *Jeffries v. Harleston*, 21 F.3d 1238 (2d Cir. 1994) which was remanded [115 S.Ct. 502, 503 (1994) memorandum].

STATEMENT OF THE CASE

A. The Incident

George Silano, a member of the Sag Harbor Union Free School District Board of Education and retired filmmaker, had volunteered to guest lecture to three Sag Harbor High School mathematics classes on February 4, 1993 concerning his career as a documentary and feature filmmaker and in particular the "persistence of vision" phenomenon. To illustrate this phenomenon to the class, Silano brought along six 35mm film clips from a film he had shot which won an award in the 1979 Atlanta Film Festival. Silano alleged that he chose "Recess" for the class because it was one of his favorite pieces of work.

Silano selected these particular film clips because he believed that a variety of static and frenetic frames would best illustrate the "persistence of vision" phenomenon and because they were the only 35mm film clips he had in his home. Each short clip was a series of 1" x 1" frames. One of these clips, the "Birth Scene," portrayed two women and one man naked from the waist up sitting motionless on rocks with three others in a static pose. The actors were not touching themselves or each other. The "topfree" chests of the three could be discerned and nothing about the frames were vulgar, sexually explicit or obscene. The women's chests had breasts which were slightly more developed than those on the man's chest.

Silano's first lecture was to a tenth-grade mathematics class. About halfway through his lecture, the film clips were passed around the class in the presence of the math teacher and principal. Silano never verbally drew the students' attention to the Birth Scene, and he confined his lecture solely to his career as a filmmaker, his film photography work and his explanation of the persistence of vision phenomenon. Following his lecture, the school principal advised Silano not to use the Birth Scene for the remaining two lectures. Silano agreed not to use it and he kept his promise. Silano's two final lectures were unaffected by the absence of the Birth Scene film clip.

B. The Aftermath

Silano received comments about the usage of the Birth Scene frame. On February 8, 1993, Silano wrote a letter of apology to the first class to which he had lectured. In this letter, he noted that the Birth Scene may have been "inappropriate for the topic under discussion" and stated that some students in the class "may have thought it provocative [sic]."

On February 18, 1993, Superintendent Roy issued an executive order in which he condemned Silano's poor judgment in selecting materials to present to tenth-grade students. The order barred Silano from visiting the Sag Harbor schools during school hours for the remainder of

the academic year. The order limited Silano's access to the Board's central office to carry out his Board duties, and attendance at sporting events and other extra-curricular functions. The order further provided that Silano could seek modification or termination of the visitation ban by petitioning the Board (App. F). The East Hampton Star quotes President Brandt predicting the School Board would censure Silano and that it "sends a message to the kids that when you're bad, you're punished."

The Board held its regular monthly public meeting on February 22, 1993. Silano was unable to attend due to illness, and he asked in advance that any discussion or action regarding his lectures be postponed until the next meeting so that he could participate. This written request was disregarded. President Brandt offered a resolution criticizing Silano's "poor judgment" in showing a film clip exhibiting "nude" actors to the tenth-grade mathematics class. The resolution included a formal "censure" of Silano and formally directed Silano (but no other Board member) to exercise appropriate judgment in the future. It was drafted by Board counsel (who noted "the problem" with "teenage boys" looking at women's breasts), and was unanimously adopted (App. G).

Silano appealed the Superintendent's order and the Board's censure to the New York State Commissioner of Education in accordance with New York Education Law

§310. The Commissioner ruled that under state law the Superintendent had the authority to ban Silano from the Sag Harbor schools during the school hours because the ban did not interfere with Silano's official duties as a member of the Board. In reaching this conclusion, the Commissioner relied on the fact that under New York State law, school board members do not have a right to make official visits to schools without express authority from the Board. As to the Board's resolution, the Commissioner held that, although the Board had the authority to criticize Silano for exercising poor judgment, it did not have the authority to censure Silano. Commissioner Sobol therefore annulled the paragraph of the resolution censuring Silano. The Commissioner expressly stated that he declined to determine any constitutional issues involved. Thus, the Commissioner declined to address speech retaliation, prior restraint, and whether the Establishment Clause prohibits promotion of a Judeo-Christian belief that sets women's chests apart from men's chests.

Prior to the Commissioner's determination that the censure was unlawful, Silano commenced this action under 42 U.S.C. §1983, alleging that his First Amendment right of free speech and his Fourteenth Amendment rights were violated by Dr. Roy's executive order and the Board's censure resolution. Silano asserted that the Birth Scene frames which he had artistically created demonstrated the equal rights of men and women

to appear together bare-chested. Silano's various affidavits and memoranda have argued that Respondents did more than merely "control curriculum" when they retaliated against him for expressing his political and irreligious views of equality of the sexes. He claims they (1) punished him for speech they never forewarned him was prohibited and (2) sought to suppress any political view on this subject other than the stereotypical Judeo/Christian ethic that sin and evil evolved as a result of Adam's fixation on Eve's nakedness in the Garden of Eden.[2]

Summary judgment was granted without first permitting Silano to depose any of the defendants as to their actual motivation for the excessive post-publication retaliation imposed as a result of Silano's artistic expression of his political views in a class of high school students. Judge Arthur D. Spatt explained in open court that Silano's First Amendment rights were not violated because (a) the classroom was not a public forum; (b) the Board is entitled to control the

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[2] Genesis, C.3, V.6-11. See *People v. David*, 459 N.Y.S.2d 564 (City Ct. 1989), reversed, 585 N.Y.S.2d 149 (Co.Ct. 1991) which was overruled by the two leading New York decisions permitting "topfree sunbathing". See *People v. Santorelli*, 587 N.Y.S.2d 601 (Ct.App. 1992) and *People v. David*, reversal. Only Indiana criminalizes the mere exposure of women's breasts in public. See *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 111 S.Ct. 2456, (1991) for Justice SCALIA's and Justice STEVENS' respective views on the rights and restrictions of 60,000 naked Hoosiers.

school's curriculum; and (c) the subject of the lecture had nothing to do with gender equality. The court also rejected Silano's due process claim, finding that the actions of Respondents had not deprived Silano of a protected property or liberty interest. The court held that the individual Respondents were entitled to qualified immunity because they were acting within their discretion and not in violation of any clear constitutional or statutory rights. Judge Spatt dismissed all New York Constitution claims as well.

The Second Circuit affirmed and found that (1) Silano's First Amendment rights were not violated because the film clips were "entirely unnecessary" to illustrate the persistence of vision; (2) Silano's constitutional rights as a public official or private citizen are "certainly" no greater than that of a teacher employed by the school district as a "trained educational professional"; (3) defendants' censure and campus ban for Silano's non-literary speech were reasonably related to "legitimate pedagogical concerns", i.e., the test set forth in *Hazelwood v. Kuhlmeier*; and (4) because Silano had no First Amendment "right to use a film-clip showing bare-breasted women" in the context of his guest lecture, the district court properly entered summary judgment against Silano for all of his First Amendment and other claims including the substantive and procedural unreasonableness of the retaliatory punishment against him by his fellow board members.

ARGUMENT AND AUTHORITIES ON REASONS FOR GRANTING THE WRIT OF CERTIORARI

FIRST ARGUMENT:

There is a direct and intolerable conflict among the Circuits concerning the important issue of whether the First Amendment prohibits "post-publication retaliation" without "pre-publication notice" of what classroom speech is prohibited.

There is a conflict among the Circuits with regard to the interpretation of prohibited retaliation aspects of the First Amendment. The conflict is direct in that this case would be decided differently in other Circuits and it is intolerable because it is clear that the improper interpretation of the First Amendment is depriving citizens of their rights in the Second Circuit. It is a fundamental principle of our democracy that the government shall not punish citizens for a past action that was not proscribed. Non-vulgar, non-lewd speech which may appear to be "school-sponsored" cannot be punished by the government in its attempt to disassociate itself from the speech and prevent its repetition.

The decision below directly conflicts with the First Circuit's recent *Ward v. Hickey*, 996 F.2d 448 (1st Cir. 1993) on the same issue of classroom speech, and an important question of modern First Amendment jurisprudence

should be settled by this Court insofar as it concerns the distinction between a school district's permissible "pre-publication control" in *Hazelwood Schl. Dist. v. Kuhlmeier*, 484 U.S. 260, 108 S. Ct. 562, 98 L.Ed.2d 592 (1988) and its impermissible "post-publication retaliation" without the "speech safeguarding procedures" required under *Waters*.

This case presents important unanswered questions for review in an area of law which has come to be known as "First Amendment retaliation."[3] The narrow question concerns the puzzlement over the meaning of footnote 6 in *Hazelwood v. Kuhlmeier*, the leading school "curriculum control" case which expanded on the doctrine announced in *Pico v. Board of Ed. Island Trees Union Free Schl. Dist.*, 638 F.2d 404 (2d Cir. 1980), and affirmed in *Board of Island Trees Union Free School Dist. v. Pico*, 457 U.S. 853, 102 S.Ct. 2799, 73 L.Ed. 43 (1982).

Hazelwood's footnote 6 identified that case as one of permissible "pre-

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[3]First Amendment retaliation cases include a citizen's "right to petition" as in *Gagliardi v. Village of Pawling*, 18 F.3d 188, 194, 195 (2d Cir. 1994), and claims against government employers by a nurse (*Waters*) and a professor (*Jeffries*), and claims by independent government contractor. Generally, neither teachers nor students "shed their constitutional rights at the schoolhouse gate." *Tinker v. Des Moines Indep. Community School District*, 393 U.S. 503, 506, 89 S.Ct. 733, 736, 21 L. Ed.2d 731 (1969). But school-sponsored speech may be pre-regulated.

publication control" over curriculum content, thus finding no First Amendment violation when school officials prohibited high school journalism students from distributing a newspaper with two articles. The school believed the articles would bear the imprimatur of the school. Left unanswered was the question of whether *Hazelwood* could ever justify retaliatory punishment against the person who introduced the material containing the speech concerning a "political" view[4] where a school board had not previously communicated intolerance in any way.

Teacher speech in the classroom has generally been treated in the Circuits differently from student speech. The speech of a "school board member-guest lecturer" was treated below as if it were "teacher speech"; "teacher speech" is not synonymous with treatment as "school-sponsored speech" insofar as its constitutionally acceptable consequences. Therefore, the *Silano* decision is incorrect when compared to numerous decisions throughout the country.

An extensive summary of the various Circuit standards for balancing the

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[4]A "political" view is broadly defined as any idea concerning "the proper way to organize and run society in general". *Pico* at 638 F.2d at 432-8. "Public concern speech" is defined generally as speech "relating to any matter of political, social, or other concern to the community." *Connick v. Meyers*, 461 U.S. 138, 146, 103 S.Ct. 1684, 1690, 75 L.Ed.2d 708 (1983).

school's right to control the curriculum against the teacher's right to classroom expression was set forth by Judge Norgle in *Krizek v. Cicero-Stickney Tp. High School D.*, 713 F.Supp. 1131 (N.D. Ill. 1989), who notes that "[i]n the majority of cases in which no advance restriction was violated, the courts have found violations of First Amendment rights." 1140.

In *Ward v. Hickey* a workable general rule emerged for educators. "In light of these competing principles, we find that a school committee may regulate a teacher's classroom speech if: (1) the regulation is reasonably related to a legitimate pedagogical concern, id. at 273, 108 S.Ct. at 571; and (2) the school provided the teacher with notice of what conduct was prohibited, see *Keyishian v. Board of Regents*, 385 U.S. 589, 604, 87 S.Ct. 675, 684, 19 L.Ed.2d 629 (1967)." *Ward* sought to clarify the "*Hazelwood* footnote 6" mystery by distinguishing between "pre-publication control" and "post-publication retaliation." So:

"Even if under the above test a school may prohibit a teacher's statements before she makes them, however, it is not entitled to retaliate against speech that it never prohibited. Cf. Mount Healthy City Board of Education, 429 U.S. at 284, 97 S.Ct. at 574 (classroom speech was constitutionally protected when school board did not suggest that teacher violated any established policy, or that the board's reaction to the communication was anything more than an ad hoc response to

[plaintiff's] communication ...). Few subjects lack controversy. If teachers must fear retaliation for every utterance, they will fear teaching. As the Supreme Court warned in *Keyishian*, 385 U.S. at 604, 87 S.Ct. at 684, "[t]he danger of that chilling effect upon the exercise of vital First Amendment rights must be guarded against by sensitive tools which clearly inform teachers what is being proscribed.

"Although the Court in *Kuhlmeier* did not address the notice issue with respect to school-sponsored speech, it stated only that *prepublication control* need not be pursuant to express regulation. *Kuhlmeier*, 484 U.S. at 273 n.6, 108 S.Ct. at 571 n.6. This suggests that the Court would agree that *post-publication retaliation* must derive from some prior limitation. Indeed, this circuit has long recognized a teacher's right to notice of what classroom conduct is prohibited. See, e.g., *Mailloux*, 448 F.2d at 1243; *Keefe v. Geanakos*, 418 F.2d 359, 362 (1st Cir. 1969).

"Of course, while we acknowledge a First Amendment right of public school teachers to know what conduct is proscribed, we do not hold that a school must expressly prohibit every imaginable inappropriate conduct by teachers. Cf. Krizek, 713 F.Supp. at 1140 (warning that such requirement is an impossible and undesirable burden). The relevant inquiry is: based on existing regulations, policies, discussions, and other forms of

communication between school administration and teachers, was it reasonable for the school to expect the teacher to know that her conduct was prohibited?"[5]

Silano cites to *Ward v. Hickey* yet seemingly overlooks its significance. Clearly, like the biology teacher in *Ward* who was not forewarned to avoid discussing abortions of Downes Syndrome fetuses, Silano had no advance "notice" of any school rule precluding the introduction of the Birth Scene clip as an optional resource material available to a single row of his teenage audience. As soon as the principal mentioned not to use it anymore, Silano readily complied with the request because at that moment he had "notice" of an ad hoc "rule".

Silano's artistic political speech is entitled to full constitutional protection. *Lebron v. National Railroad Passenger Corp.*, __ U.S. __, 115 S.Ct. 961 (1995). A wealth of educational materials is now accessible only through

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[5]In *Waters* Justice O'CONNOR discussed the future emergence of "some workable general rule" at 1885-1886. In *U.S. v. Treasury Employees Union*, __ U.S.__, 115 S.Ct. 1003,(1995) Justice O'CONNOR noted the *ex ante/ex post* analysis and mentioned "codification of its policies as workplace rules (which incidentally provide notice to employees)." *Ward's* "relevant inquiry" is one such general test to determine whether the government employer had implemented sufficient speech safeguarding procedures as a mandatory pre-requisite to punish for conduct that detracts from the government agency's efficient operation.

new non-literary technology.As individual classrooms obtain their own computer libraries, the distinction between *Hazelwood* "curriculum" and *Pico* "resource" materials is already a blurry memory.

The Second Circuit declined to make the distinction between "pre-publication curriculum control" by advance notice and "post-publication punishment" for conduct which is retroactively identified as falling outside the scope of acceptable curriculum (and which can easily be pretextually narrowed in hindsight). The decision below is inconsistent with the advance "notice" requirements to which schools in the First and Fifth[6] Circuits have been held when they seek to retaliate against teachers for past speech. Advance notice has traditionally been required by the Court to punish.[7] *Keyishian*. The decision also conflicts with the Ninth Circuit's interpretation of *Hazelwood* limiting the right "to suppress or punish" school-sponsored speech to pertain only to "vulgar, lewd or plainly offensive" speech and limits the school's response to any other speech to merely "disassociate itself" from the

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[6]See *Kingsville Independent School District v. Cooper*, 611 F. 2d 1109 (5th Cir. 1980).

[7]In *Bethel School Dist. No. 403 v. Fraser*, 478 U.S. 675 (1986) the student was aware of the student conduct code and the student speech was "vulgar" and "sexually explicit". Such speech is prohibited in the classroom with or without any prior communication thereof. *Pico*, id.

speech in a reasonable non-punishing way. *Chandler v. McMinnville School District*, 978 F. 2d 524, 529 (9th Cir. 1992).

Silano conflicts with the Tenth Circuit's view insofar as it would find reasonable, only actions which limited a teacher's similar future conduct, and provided a brief leave for investigatory purposes and an opportunity for the board to "disassociate itself" during that few day period. *Miles v. Denver Public Schools*, 947 F. 2d 773 (10th Cir. 1991).

SECOND ARGUMENT:

The Second Circuit sanctioned the district court's departure from the accepted and usual procedural safeguards by affirming a grant of summary judgment without permitting discovery of the District's actual motivation for excessive retaliation against a public official.

Because the government operates differently as a sovereign, rather than an employer, a non-employee's civil rights suit against a school district should not be dismissed on summary judgment where the actual motivations for excessive retaliation were in dispute and the classroom visitor held a reasonable belief that his "non-literary speech" on a political issue was appropriate. As an individual, Silano had a reasonable belief that his speech would be protect-

ed.[8] Until he received notice that the "speech" was forbidden, it did not occur to Silano that it would be unprotected.

"If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion or other matters of opinion .. If there are any circumstances which permit an exception, they do not now occur to us." (emphasis added). *West Virginia Bd. of Educ. v. Barnette*, 319 U.S. 624 at 642, 63 S.Ct. 1178 at 1187, 87 L.Ed. 1628 (1943).

The granting of summary judgment against Silano is improper since he is protected as a non-employee under the First Amendment friendlier standard of *Perry v. Sinderman*, 408 U.S. 593, 92 S.Ct. 2694, 33 L.Ed.2d 570 (1972), not only the *Mt. Healthy City Schl. Dist. v. Doyle*, 429 U.S.274, 97 S.Ct. 568 (1977) or *Connick* standard.[9] Silano's First

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[8]As Justice SCALIA said in *Waters* at 1893: "I do not doubt that the First Amendment contains within it some procedural prescriptions - that in some circumstances, "the freedom of speech" recognized by the Constitution consisted of a right to speak unless and until certain procedures to prevent the speech had first been complied with."

[9]The granting of summary judgment against a non-tenured teacher, without a full exploration of the teacher's claim that his contract was not renewed on the constitutionally impermissible basis of reprisal because of the teacher's exercise of free speech, is improper. See *Perry*.

Amendment rights should have been analyzed as any non-employee's artists' rights are. An artist's rights are interpreted in *Serra v. U.S. General Services Admin.*, 847 F.2d 1045 (2d Cir. 1988) which relied on the *Pico* test.[10]

Silano's conduct was scrutinized by the political majority given Silano's special status as an elected official. Silano presented enough evidence to create a material issue of disputed fact about Respondents' actual motivation for promulgating a formal censure resolution and banning him from campus for the remainder of the semester. He established that he favored lower school taxes and greater gender equality. The Second Circuit diverted from constitutional safeguards by affirmance of summary judgment precluding discovery when the question remained as to whether the Board punished to merely "control classroom curriculum" or whether that was a pretext for a religious and political agenda.

Denial of summary judgment in the school's favor would be proper because the evidence did not foreclose the possibility that the school board's

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See also *McCarthy v. Fletcher*, 207 Cal.App.3d 130, 254 Cal.Rptr. 714 (Cal.App.5 Dist. 1989)

[10]"If Serra had presented any facts to create a general issue as to whether GSA was removing "Tilted Arc" to condemn a political view or otherwise trench upon First Amendment rights, we would require a trial, just as we did in *Pico*."

decisicns rested either upon disagreement with constitutionally protected ideas or the board's desire to impose upon students a religious orthodoxy to which the board and its constituents adhered.

THIRD ARGUMENT:

The Second Circuit decided the federal questions concerning a non-employee's First Amendment right of protection from retaliation for speech in a way that conflicts with this Court's prior applicable decisions and decisions in several Circuits.

The Birth Scene clip was not vulgar, sexually explicit nor obscene. Nor did Respondents ever express reasonable belief that it was such. No one disputes that it was not disruptive. A "slight embarrassment" was allegedly expressed by some students but Dr. Roy noted no irreparable harm had occurred. Under *Pyle v. So. Hadley School Com.*, 861 F. Supp. 157 (D. Mass 1994) a Board exceeds its scope of restraint on student speech when it judges the content of the speech. It cannot exclude speech on the basis of whether one might interpret the speech as "harassment" of female students so long as there is not a material disruption. Because Silano's speech is not that of a teacher but rather as that of a non-teacher, the correct test includes an inquiry into whether there was any "substantial disruption." There was no finding of any such classroom disruption and so Silano's non-lewd speech has First

Amendment protection as "school-sponsored speech" insofar as the most a Board can do is "disassociate itself" from the past speech and exclude it from future classroom lectures. Exclusion cannot properly occur on the basis of an impermissible content-based reason, such as "religion".

Government speech endorsing religion which the Establishment Clause forbids differs from private speech endorsing religion which the Free Speech and Free Exercise Clauses protect. The only "secular" reason advanced in *Silano* as justification for the extreme punishment of Silano's speech is a quote from *Ward* about student "maturity". There is no logic as to why any tenth grader lacks the maturity to process a message of sexual equality simply because of its presentation by a non-lewd 1"x1" frame of a woman's chest. The punishment is for Silano's <u>irreligious</u> viewpoint which runs counter to the Judeo-Christian ethic. See *Washegesic v. Bloomingdale Public Schools*, 33 F. 3d 679 (6th Cir. 1994)

The Fifth and Tenth Circuits conflict with the Third and Seventh Circuits on whether an independent government contractor is subject to the *Pickering* balancing test or another standard. The Tenth Circuit begs: "We agree with the Seventh and Third Circuits that this is an area in which Supreme Court guidance is particularly needed." *Umbehr v. McClure*, 44 F.3d 876, 883 (10th Cir. 1995). Court analysis of these First Amendment issues is needed because local

municipalities across the country now define and implement the government's "retaliatory powers" quite differently.

The Eleventh Circuit stated in *Bishop v. Aronov*, 926 F. 2d 1066, 1070 (11th Cir. 1991): "First Amendment doctrines are manifold and their diverse facts and analyses may reveal but one consistent truth with respect to the Amendment -- each case is decided on its own merits." The case below was wrongly decided. Even if some reasonable punishment without prior notice is appropriate for teachers, Respondents' power play was an unreasonable exercise of governmental authority which greatly exceeded their limited right to merely disassociate from past speech and right to limit its reoccurrence in the classroom by establishing a constitutional policy.

The Court should grant the petition to allow Silano to have his rights fully adjudicated as a citizen and an elected official, not as an employee. Silano was not a teacher. They gave him no rules prior to his first lecture. He was retaliated against and excluded for not exercising an arbitrary degree of judgment which a political majority later said was commensurate with his office. No other Circuit in the nation would have similarly decided this case.

FOURTH ARGUMENT:

The Second Circuit has decided a federal question in an overbroad and

prejudicial way which substantially and procedurally conflicts with the highest Court in New York's decisions on educational, gender equality, and public official issues in accordance with the State Constitution and precedent.

The decision conflicts with the determination of New York's Commissioner of Education who found Respondents could not lawfully censure Silano. New York recognizes that a fair application of *Hazelwood's* "legitimate pedagogical concern" test does not permit retaliation against teachers for artistically expressed "political" speech without advance notice of prohibition inasmuch as the rule is that a school district's prior restraint of "public concern" speech by communicated regulations is actually more permissible than the alternative of after the fact punishment of any employee for deviation from any vaguely defined "appropriate judgment".

Silano conflicts with *Waters* and *People v. Santorelli* because the author of "political" speech which artistically conveyed "gender equality" may not be publicly censured and banned from campus after a finding -- <u>prior</u> to punishment -- that "significant irreparable damage has not been done to the students involved," and where the government's desire to maintain community respect did not justify the excessive punishment merely to preclude the remote possibility of potential disruption in the distant future after the speaker willingly agreed

to refrain from repetition.

Silano misapplies the *Waters* and *Hazelwood* doctrines to New York School Board members and teachers even if Silano was held to the more strictly regulated employee speech standards. *Waters* did not endorse the government's unbridled post-publication retaliation where there might ultimately be some remote nexus between the past conduct and a vaguely predicted future disruption. Prior to granting summary judgment, defendants' motives must be examined. Silano posed no threat at the workplace. Any court decision that permits retaliation for "unnecessary" speech is a danger to a free society.

New York's Court of Appeals would find Silano's gender equality message educationally suitable. *Santorelli* notes "one of the most important purposes to be served by the Equal Protection Clause is to ensure that public sensibilities grounded in prejudice and unexamined stereotypes do not become enshrined as part of the official policy of the government." *O'Connor v. Sobol*, 577 N.Y.S.2d 76 (A.D. Dept. 1991) permits only a di minimus pre-screen of controversial material to pre-determine suitability. *Joki v. Bd. of Educ. of Schuylerville Cent. S.D.*, 745 F. Supp. 822, 830 (N.D.N.Y. 1990), held that "an endorsement of the Judeo-Christian tradition is just as unconstitutional as an endorsement of Christianity alone." Justice SOUTER notes "[i]t is a principal at the heart of the Establishment Clause,

that government should not prefer ... religion to irreligion." *Board of Educ. of Kiryas Joel Village School Dist. v. Grumet*, __ U.S. __, 114 S.Ct. 2481 (1994). *Barnes* noted at 2461 that an 1877 Indiana case traced the offense of bare breasts directly to the Bible story of Adam and Eve. Surely, it is time to eliminate all such prejudice in public schools, particularly in Long Island where breast care is a household concern because the incidence of breast cancer is higher than anywhere else in the America.[11] No one should be denied equal rights because of the shape of her skin.

FIFTH ARGUMENT:

The Second Circuit has incorrectly decided the federal questions concerning Silano's rights as an elected public official and a citizen under the Fifth and Fourteenth Amendments, encompassing the civil rights of Equal Protection and entitlement to property and liberty interests of which he has been deprived without procedural due process.

The decision below prejudicially

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[11]The injustice of the perpetuation of sexual inequality brought a pregnant electrician to Court: "We think it now settled beyond doubt that one aim of the civil rights law is to free working women from the shackles of outworn prejudices that for too long have been firmly clamped upon the body of the law." *Kelber v. Joint Industry Board of the Electrical Industry*, 27 F.3d 42 (2d Cir. 1994), (reversing Judge Spatt).

affirms denial of Silano's equal protection, substantive due process, and procedural due process rights because the school board's unprivileged conduct and "bill of attainder" substantially infringed Silano's ability to exercise his state and federal constitutional rights as a duly elected public official who should be allowed to represent his constituents on equal parity with his fellow board members who had access to certain facilities when he did not. The opinion intolerably perpetuates an unconstitutional situation capable of repetition and now evading review.[12]

New York interprets *Hazelwood* so that a teacher who presented inappropriate material to a high school class may receive only the limited "punishment" of a private letter of admonishment directly to the teacher to have future "controversial" material pre-screened by the supervisor. *O'Connor v. Sobol*. Prescreen is a form of curriculum control in schools. The Second Circuit view in *Silano* is that unless the speech is "necessary" to the topic then being discussed, the district can justifiably

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[12]Ignoring the New York State guidelines and Silano's claims that his rights under the New York State Constitution were violated as well, the district court dismissed the complaint in its entirety "with prejudice," precluding review of the issues preserved in the Commissioner of Education's determination which could have otherwise been reviewed in state court had the dismissal "with prejudice" not invoked the res judicata.

retaliate for its utterance in order to preserve "community respect" for the image of the school itself as a sovereign even where state law holds otherwise.

Silano's "takings" and "Equal Protection" arguments rest upon his status as an elected public official as well as his status as a citizen. The inquiry begin with the nature of the civil rights he possesses and ends with the manner in which they were infringed. School Policy 3210 established the rights of citizenry to be on the "open campus", visit the library, and wander the grassy areas. State common law grants the rights of any elected official on parity with his fellow board members who grant themselves rights greater than the State's minimal campus visitation rights.

"There is little justification for a rule that the magnitude of the loss determines whether an individual's First Amendment rights have been violated." *Umbehr* at 883. *Rutan v. Republican Party of Illinois*, 497 U.S. 62, 110 S.Ct. 2729, 111 L.Ed.2d 52 (1990) established First Amendment protections even if there is less than a complete loss of one's job. With increasing "privatization" of government, there no longer is "the assumption that independent contractors have less at stake than an employee [punished for speech], and the loss of a contract is less devastating than the loss of a job." (*Umbehr* at 883). Similarly, loss of a public official's prestige of office when caused by

perception of ineffectiveness can devastate a political career.

It is beyond cavil that the First Amendment extends protection to local legislators who promulgate school policy. In matters related to her office, the scope is broad. A New York legislator has absolute immunity from challenge under the Speech and Debate Clause for job-related speech and conduct outside of the officially noticed public meeting when it relates to "information-gathering" activities which she deems necessary to do her job. See *People v. Ohrenstein*, 77 N.Y. 2d 38 (1990). (adopting the Court's interpretation of the Clause in New York). Under *Hutchinson v. Proxmire*, 443 U.S. 111, 99 S.Ct. 2675, 61 L.Ed.2d 411 (1974) the clause immunizes information-gathering activities which are "essential to the deliberation of the Senate" and which are thus part of Congress' duty to inform itself in order to prepare committee reports and vote on issues.[13] Because Silano and the Board Members had discussed the students' poor attitude toward math and Silano went into the classroom to personally acquaint himself with the dynamics of the problem, his silent artistic "speech" was absolutely protected because the lesson as a whole

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[13]*Proxmire* quotes: "The informing function of Congress should be preferred even to its legislative function ... [T]he only real self-governing people is that people which discusses and interrogates its administration." Woodrow Wilson, Congressional Government 303 (1885)."

would hasten the flow of information to the Board related to low math scores.

It is well established that "even though a person has no `right' to a valuable government benefit and even though the government may deny him the benefit for any number of reasons, there are some reasons upon which the government may not rely. It may not deny a benefit to a person on a basis that infringes his constitutionally protected interests - especially, his interest in freedom of speech." *Perry v. Sinderman*, 408 U.S. 593, 597 (1972) (cited in *Blackburn v. Marshall, City of*, 42 F.3d 925, 931, (5th Cir. 1995) (police chief revoked permit to use police radio frequency because of his speech.) Under *Vitarelli v. Seaton*, 359 U.S. 535, 79 S.Ct. 968 (1959), 3 L.Ed.2d 1012, since Silano's punishment was based upon his speech, Respondents cannot retaliate without a proper hearing with notice and an opportunity to be heard. See *Wisconsin v. Constantineau*, 400 U.S. 433, 91 S.Ct. 507, 27 L.Ed.2d 515 (1971).

As an elected public official, Silano had rights and expectations equivalent to liberty and property interests and benefits. When the scope of Silano's rights were construed to be other than co-terminus with those of his fellow Board Members in an actual and de facto way, the Equal Protection Clause was violated. Silano had visitation rights under both School Policy 3210 and common law rights of elected officials.

Respondents also limited Silano's exercise of such rights as an elected official by engaging in an unconstitutional prior restraint of expectancies of his "future" "conduct and judgment" with regard to a totally arbitrary "appropriate judgment" standard. A standard that no one can articulate fails to pass constitutional muster. Because the Board members themselves have no objective guidelines to follow, they resort to their own subjective feelings. Such feelings are as vague and undefined as those they failed to establish. "This is the very epitome of discretionary arbitrary enforcement of the law" by a local board. See *Anderson v. City of Isaquah*, 70 Wash. App. 64, 851 P. 2d 744, 752 (Wash App. 1993) (unconstitutionally vague design review board standards).

CONCLUSION

As Judge Ponsor wrote in *So. Hadley School*, it is easy to assume a tempest in a teapot is trivial, unless you happen to be in the teapot. "These teacup-sized tempests are the workaday world of our Bill of Rights. It would be ominous indeed if the friction between individual rights and responsible authority were ever completely to end." Id. at 173.

George Silano is in such a tempest merely as a result of trying his best to do the job he was elected to do. It would be most unfortunate if the Second Circuit view remains the model of speech for those seeking guidance in the Circuit.

Hazelwood has not been reviewed by the Court since 1988. The Circuits and district courts have not been consistent in interpreting First Amendment retaliation aspects of the case. Silano believes that *Hazelwood* does not imbue school boards with extraordinary powers of retaliation that other municipalities lack so that school boards can altogether avoid exercising their discretion in a manner that comports with the transcendent imperatives of the First Amendment of which the Court spoke in *Pico*.

First Amendment retaliation cases invite a look at both the speech to be protected and the manner and extent of government reaction. The Second Circuit has extended *Hazelwood* into the field of retaliation in a manner which was not intended by the Court. Since the non-lewd artistic expression of gender-equality was not a declared prohibition when Silano began his lecture, the Birth Scene film clip was entitled to full First Amendment protection until notice was given. Board Member Silano was not a threat to the functioning of the school. Because the investigation revealed that no disruption had taken place and no harm done, the censure resolution, banishment, and vaguely defined prior restraint were unconstitutional.

Petitioner respectfully requests that the Court grant the Petition. The case conflicts with the Court's views in on First Amendment retaliation and Equal Protection and it was wrongly decided.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 387—August Term, 1994

(Argued: September 20, 1994

Decided: December 8, 1994)

Docket No. 94-7025

GEORGE SILANO, By and on behalf of himself and the high school students in the Sag Harbor Union Free School District,

Plaintiff-Appellant,

—v.—

SAG HARBOR UNION FREE SCHOOL DISTRICT BOARD OF EDUCATION, THOMAS ROY, Dr., Individually, and in his official capacity as Superintendent, PATRICIA BRANDT, Individually, and in her official capacity as President of the Board of Education, THOMAS HORN, JR., Individually, and in his official capacity as Vice President of the Board of Education,

Defendants-Appellees.

Before:

VAN GRAAFEILAND, MINER, and MCLAUGHLIN,
Circuit Judges.

Appeal from judgment entered on December 20, 1993 in the United States District Court for the Eastern District of New York (Spatt, J.) granting motion by defendants for summary judgment and dismissing complaint, the district court having found as a matter of law that plaintiff's First Amendment right to free speech and Fourteenth Amendment right to due process had not been violated, and that the individual defendants were entitled to qualified immunity.

Affirmed.

PATRICIA WEISS, Sag Harbor, NY *for Plaintiff-Appellant.*

RICHARD HAMBURGER (Block, Amelkin & Hamburger, Smithtown, NY) *for Defendants-Appellees.*

MINER, *Circuit Judge*:

Plaintiff-appellant George Silano appeals from a judgment entered on December 20, 1993 in the United States District Court for the Eastern District of New York (Spatt, J.), granting summary judgment in favor of defendants-appellees, the Sag Harbor Union Free School District Board of Education ("the Board"), Dr. Thomas Roy, the Superintendent of the Sag Harbor school system, Patricia Brandt, President of the Board, and Thomas Horn, Jr., Vice President of the Board, and dismissing Silano's complaint.

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BACKGROUND

Silano, a member of the Board and a retired filmmaker, had volunteered to lecture to three Sag Harbor High School mathematics classes on February 4, 1993 concerning the "persistence of vision" phenomenon. To illustrate this phenomenon to the class, Silano brought along six 35mm film clips. Silano testified in a deposition that he selected these particular film clips because he believed that a variety of static and frenetic frames would best illustrate the "persistence of vision" phenomenon and because they were the only 35mm film clips he had in his home. One of these clips, the "Birth Scene," portrayed two women and one man naked from the waist up.

Silano's first lecture was to a tenth-grade mathematics class. About half-way through his lecture, the film clips were passed around the class. Silano never drew the students' attention to the Birth Scene, and he confined his discussion solely to the persistence of vision phenomenon. Following his lecture, the school principal, who had been present for a portion of the presentation, advised Silano not to use the Birth Scene for the remaining two lectures. Silano agreed, and later testified that his two remaining lectures were unaffected by the absence of the Birth Scene film clip.

On February 8, 1993, Silano wrote a letter of apology to the first class to which he had lectured. In this letter, he conceded that the Birth Scene may have been "inappropriate for the topic under discussion" and acknowledged that some students in the class "may have thought it provacative [sic]." Apparently, the apology was not enough for the defendants-appellees and some parents.

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On February 18, 1993, Superintendent Roy issued an executive order in which he condemned Silano's poor judgment in selecting materials to present to tenth-grade students. The order barred Silano from visiting the Sag Harbor schools during school hours for the remainder of the academic year. However, this order specifically provided that Silano would continue to have access to the Board's central office to carry out his Board of Education duties, and that he could attend sporting events and other school functions. The order further provided that Silano could seek modification or termination of the visitation ban by petitioning the Board.

The Board held its regular monthly meeting on February 22, 1993. Silano was unable to attend the meeting, and he asked that any discussion or action regarding his lectures be postponed until the next meeting. This request was disregarded. At the meeting, President Brandt offered a resolution criticizing Silano's poor judgment in showing a film clip exhibiting nude actors to the tenth-grade mathematics class. The resolution included a censure of Silano. This resolution, drafted by counsel to the School Board, was unanimously adopted by the six Board members present.

Silano promptly appealed the Superintendent's order and the Board's censure to the New York State Commissioner of Education. On July 22, 1993, the Commissioner ruled that the Superintendent had the authority to ban Silano from the Sag Harbor schools during school hours because the ban did not interfere with Silano's duties as a member of the Board. In reaching this conclusion, the Commissioner relied on the fact that under New York State law, school board members do not have a right to make official visits to schools without express authority from the school board. As to the Board's

resolution, the Commissioner held that, although the Board had the authority to criticize Silano for exercising poor judgment, it did not have the authority to censure Silano. The Commissioner therefore annulled the paragraph of the resolution censuring Silano.

Prior to the Commissioner's decision, Silano commenced this action under 42 U.S.C. § 1983, alleging that his First Amendment right of free speech and his Fourteenth Amendment due process rights were violated by the Superintendent's February 18, 1993 order and the Board's February 22, 1993 censure resolution. During this litigation, Silano, for the first time, asserted that the Birth Scene demonstrated the equal rights of men and women to appear together bare-chested. The district court granted defendants' motion for summary judgment, holding that Silano's First Amendment rights were not violated because (a) the classroom was not a public forum, (b) the Board is entitled to control the school's curriculum, and (c) the subject of the lecture had nothing to do with gender equality. The district court also rejected Silano's due process claim, finding that the actions of defendants-appellees had not deprived Silano of a protected property or liberty interest. Finally, the court held that the individual defendants were entitled to qualified immunity because they were acting within their discretion and not in violation of any clear constitutional or statutory rights. Silano appeals the district court's grant of summary judgment in favor of defendants-appellees and the dismissal of his complaint.

DISCUSSION

Summary judgment is proper when the moving party establishes, through affidavits and other evidence, that

there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). We review the district court's grant of summary judgment *de novo*. *Peoples Westchester Sav. Bank v. Federal Deposit Ins. Corp.*, 961 F.2d 327, 330 (2d Cir. 1992). In this case, the material facts were not in dispute and the district court properly granted summary judgment for defendants.

1. First Amendment Claim

First, we address the dismissal of Silano's First Amendment claims. The district court dismissed Silano's claim on the ground that, as a matter of law, he had no First Amendment right to show photographs of bare-chested women to tenth-grade mathematics students during a lecture on a scientific phenomenon. We agree with the district court.

The Supreme Court has consistently held that teachers and students do not "shed their constitutional rights to freedom of speech . . . at the schoolhouse gate." *Tinker v. Des Moines Independent Community School Dist.*, 393 U.S. 503, 506 (1969). On the other hand, the Court also has recognized that public schools may limit classroom speech to promote educational goals. *See Hazelwood School Dist. v. Kuhlmeier*, 484 U.S. 260, 266-67 (1988); *Tinker*, 393 U.S. at 506-07. In light of these competing concerns, the Supreme Court has held that educators may limit the content of school-sponsored speech so long as the limitations are "reasonably related to legitimate pedagogical concerns." *Hazelwood*, 484 U.S. at 273. Thus, the ultimate authority to determine " 'what manner of speech in the classroom . . . is inappropriate properly rests with the school board,' rather than with the federal courts." *Id.* at 267 (quoting *Bethel School Dist. No. 403*

v. Fraser, 478 U.S. 675, 683 (1986)) (internal citation omitted). School officials are in the best position to ensure that their students "learn whatever lessons [an] activity is designed to teach, [and] that readers or listeners are not exposed to material that may be inappropriate for their level of maturity." *Id.* at 271. Whether a school official's action is reasonably related to a legitimate pedagogical concern "will depend on, among other things, the age and sophistication of the students, the relationship between teaching method and valid educational objective, and the context and manner of the presentation." *Ward v. Hickey*, 996 F.2d 448, 453 (1st Cir. 1993); *see Hazelwood*, 484 U.S. at 271, 274.

While Silano was merely a guest lecturer, rather than a teacher employed by the Board, the Supreme Court has recognized that school administrators may exercise authority over "expressive activities that students, parents, and members of the public might reasonably perceive to bear the imprimatur of the school." *Hazelwood*, 484 U.S. at 271. Given that Silano's lecture took place in a traditional classroom setting and was designed to impart particular knowledge to the student participants, we conclude that the "legitimate pedagogical concern" test of *Hazelwood* is the appropriate measure of the school administration's authority to restrict Silano's speech. Certainly, Silano, a guest in the classroom, was entitled to no more deference than a trained education professional.

Applying the *Hazelwood* standard, we agree with the district court that the undisputed facts show that the actions of the Sag Harbor school officials were reasonably related to legitimate pedagogical concerns. Silano received permission to lecture the tenth-grade mathematics classes on the "persistence of vision." Depictions

of bare-chested women were entirely unnecessary to illustrate this scientific phenomenon. In fact, Silano's two subsequent presentations, conducted without the disputed film clip, were, by his own admission, just as successful in demonstrating and explaining "persistence of vision."

Silano now contends that the Birth Scene was intended to express a message of gender equality. However, during the class period, there was no discussion, or even reference, to the subject of nudity, women's breasts, gender-neutrality, or a woman's right to appear bare-chested in circumstances in which a man is entitled to appear bare-chested. The fact that Silano brought the Birth Scene film clip to class only because it was among the six 35mm film clips he had in his home further demonstrates the post-hoc nature of his purported gender-equality message Given that the disputed film clip was entirely unnecessary to the subject matter of Silano's lecture, the school officials had a legitimate pedagogical purpose in restricting the display of photographs of bare-chested women in a tenth-grade classroom.

Silano argues that the district court erred in applying the *Hazelwood* test because his film clips are more akin to library resources than to school curriculum. In *Board of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico*, 457 U.S. 853, 869-72 (1982), a plurality of the Supreme Court held that school administrators could not remove books from a school library to suppress political ideas with which the administrators disagreed. Silano asserts that the disputed film clip falls within the heightened protection provided to library resources. This contention is without merit. The Supreme Court has stated that school activities that "are supervised by faculty members and designed to impart particular knowledge or

skills to student participants" should be considered curriculum. *Hazelwood*, 484 U.S. at 271. Moreover, the distinguishing factor between library resources and curriculum is that library resources are something that students voluntarily may view at their leisure, whereas curriculum is required material for students. *Pico*, 457 U.S. at 869 (plurality opinion). Here, the students were required to attend mathematics class, their teacher was present, and the purpose was to impart knowledge of how filmmaking relates to mathematics. The district court's finding that the lectures were analogous to curriculum was correct.

Silano also contends that the School Board was required to have clearly-established rules and procedures in place for regulating the curriculum. In *Hazelwood*, the Supreme Court explicitly rejected this requirement, stating that "[t]o require such regulations in the context of a curricular activity could unduly constrain the ability of educators to educate." 484 U.S. at 273 n.6. Having concluded that school administrators can exercise at least as much control over the speech of guest lecturers as teachers, we conclude that specific regulations were not required in this context.

Because Silano had no First Amendment right to use a film-clip showing bare-breasted women in a lecture to a tenth-grade mathematics class intended to explain the "persistence of vision," we conclude that the district court properly entered summary judgment against Silano on his First Amendment claims.

2. Due Process

Silano also challenges the Board's censure and the Superintendent's order on due process grounds. The

district court held that Silano was not deprived of any property or liberty interests, and, in the alternative, that the only process Silano was due was the post-deprivation hearing that he was accorded. We agree that Silano has failed to establish the deprivation of a liberty or property interest protected by the Due Process Clause.

First, we address the Board's resolution censuring Silano. Damage to reputation alone, even by a government entity, does not implicate a liberty interest protected by the Due Process Clause. *See Paul v. Davis*, 424 U.S. 693, 701, 706 (1976). Our cases have interpreted *Paul* to require the modification or termination of some legal right or status before damage to reputation rises to the level of a constitutional deprivation. *See Martz v. Incorporated Village of Valley Stream*, 22 F.3d 26, 31-32 (2d Cir. 1994); *Neu v. Corcoran*, 869 F.2d 662, 667 (2d. Cir.), *cert. denied*, 493 U.S. 816 (1989). As the district court properly concluded, Silano has failed to put forth any evidence showing that the Board's censure affected any legal right or status. Accordingly, the Board's censure did not implicate a liberty interest protected by the Due Process Clause.

The Superintendent's order forbidding Silano from entering the school grounds also fails to implicate a protected liberty or property interest. Property and liberty interests protected by the Due Process Clause are ordinarily created and defined by state law. *See Paul*, 424 U.S. at 709. As a Board of Education member, Silano did not have an unrestricted right to enter the school classrooms or hallways during school hours. *See Coughlan v. Cowan*, 190 N.Y.S.2d 934, 937 (Sup. Ct. 1959); *Matter of Bruno*, 4 Ed. Dept. Rep. 14, 17-18 (1964). Moreover, the Superintendent's memorandum specifically provided Silano with access to all facilities

necessary for him to function as a member of the Board. Therefore, the district court was correct in its conclusion that the Superintendent's order did not deprive Silano of any property or liberty interest conferred upon him by his status as a member of the Board of Education.

Silano, however, contends that the Superintendent's visitation ban deprived him of a liberty interest conferred by School District Policy No. 3210 (1989) ("Policy 3210"). Policy 3210 states that the Board of Education "welcome[s] members of the community and other interested persons to visit the schools." Pursuant to this policy, the Superintendent is authorized to establish regulations to "encourage visitors" while "insur[ing] that such visits will enhance the effect of the educational program rather than hinder it." The policy also requires visitors to "sign in" at the main office and explain their presence, and obtain permission from the school principal before visiting classrooms.

"To create a constitutionally protected liberty interest, a state regulation must employ 'language of an unmistakably mandatory character, requiring that certain procedures "shall," "will," or "must" be employed . . . .' " *Russell v. Coughlin*, 910 F.2d 75, 77 (2d Cir. 1990) (quoting *Hewitt v. Helms*, 459 U.S. 460, 471-72 (1983)). "It is only through 'the repeated use of explicitly mandatory language in connection with requiring specific substantive predicates' " that a liberty interest arises. *Purnell v. Lord*, 952 F.2d 679, 684 (2d Cir. 1992) (quoting *Hewitt*, 459 U.S. at 472). For example, in *Purnell*, we rejected plaintiff's argument that a liberty interest was created by a policy directive stating that "[t]he sending and receiving of mail by inmates will be restricted only to the extent necessary to prevent physical injury to persons, maintain security and good order

in the facilities, and prevent interference in the general public order." *Id.* We held that this general policy statement did not create a liberty interest because it did not "contain language 'requiring specific substantive predicates' to be followed in connection with the establishment or revocation of an inmate's authorization to correspond with another inmate." *Id.*

Applying these standards, we conclude that Policy 3210 does not vest the public with a protected liberty interest in visiting Sag Harbor schools. The policy does not impose any obligations upon school officials. The only mandatory language in the policy statement is directed toward visitors, requiring them to "sign in" and explain their presence, and to obtain permission in advance if they wish to visit a classroom. Moreover, by requiring visitors to "sign in" and explain their presence, this policy clearly contemplates that certain types of visits and visitors would be inappropriate in the school environment, thus calling for school officials to exercise their discretion. *See Hernandez v. Coughlin*, 18 F.3d 133, 137 (2d Cir.) ("[I]t is clear that these regulations contain no specific set of criteria that when met would make participation in [the program] mandatory, or that would significantly limit a prison official's discretion . . . ."), *cert. denied*, 115 S. Ct. 117 (1994). In fact, the policy specifically authorizes the Superintendent to establish regulations to ensure that visits do not "hinder" the educational program. For these reasons, we cannot say that the School District's general policy of welcoming visitors created a liberty interest protected by the Due Process Clause. We therefore agree with the district court that the temporary ban on Silano's visits to the Sag Harbor schools did not violate his due process rights.

In light of our conclusion that the censure resolution and visitation ban did not violate Silano's constitutional rights, we need not reach the merits of the qualified immunity defense interposed by the individual defendants.

CONCLUSION

For the foregoing reasons, the judgment of the district court is affirmed.

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

GEORGE SILANO, by and on behalf of himself and the high school students in the Sag Harbor Union Free School District, Plaintiff,	Case #CV 93-1924 (ADS)
- against -	ORDER
SAG HARBOR UNION FREE SCHOOL DISTRICT BOARD OF EDUCATION, SUPERINTENDENT DR. THOMAS ROY individually and in his official capacity as Superintendent, PATRICIA BRANDT individually and in her official capacity as President of the Board of Education, and THOMAS HORN, JR. individually and in in his official capacity as Vice President of the Board of Education, Defendants.	

A P P E A R A N C E S :

PATRICIA WEISS, ESQ.
Attorney for the Plaintiff
177 Jermain Avenue
P. O. Box 751
Sag Harbor, New York 11963-0019

BLOCK, AMELKIN & HAMBURGER
Attorneys for the Defendants
202 East Main Street
Smithtown, New York 11787-2813

By: Richard Hamburger, Esq.
Of Counsel

SPATT, District Judge:

The defendants move for summary judgment pursuant to Fed. R. Civ. P. 56(b), to dismiss the complaint in its entirety, or in the alternative, to dismiss the complaint as to the individual defendants on the grounds of qualified immunity. The plaintiff opposes the defendants' motion.

Having reviewed the documents submitted by the parties, having heard oral argument on December 10, 1993, and for the reasons stated in the record during oral argument, it is hereby

ORDERED, that the defendants' motion for summary judgment pursuant to Fed. R. Civ. P. 56(b) is GRANTED; and it is further

ORDERED that the plaintiff's complaint is dismissed in its entirety, with prejudice.

The Clerk of the Court is advised that this action closes the case.

SO ORDERED.

Dated: Uniondale, New York
December 10, 1993

/S/
ARTHUR D. SPATT
U.S. District Judge

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 27th day of January one thousand nine hundred and ninety-five.

Present:

Hon. Ellsworth A. Van Graafeiland
Hon. Roger J. Miner
Hon. Joseph M. McLaughlin
Circuit Judges,

GEORGE SILANO, by and on behalf of himself and the high school students in the Sag Harbor Union Free School District,
Plaintiff-Appellant,

v.

SAG HARBOR UNION FREE SCHOOL DISTRICT BOARD OF EDUCATION, SUPERINTENDENT DR. THOMAS ROY individually and in his official capacity as Superintendent, PATRICIA BRANDT individually and in her official capacity as President of the Board of Education, and THOMAS HORN, JR. individually and in

Docket #94-7025

in his official capacity as :
Vice President of the Board of :
Education, :
Defendants-Appellees. x

A petition for rehearing having been filed herein by Appellant George Silano.

Upon consideration by the panel that decided the appeal it is

Ordered that said petition be and it hereby is DENIED.

FOR THE COURT,
GEORGE LANGE III, Clerk

By: \S\

Carolyn Clark Campbell
Chief Deputy Clerk

APPENDIX D

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

GEORGE SILANO, by and on behalf of himself and the high school students in the Sag Harbor Union Free School District, Plaintiff,	Case #CV 93-1924 (ADS)
- against -	JUDGMENT
SAG HARBOR UNION FREE SCHOOL DISTRICT BOARD OF EDUCATION, SUPERINTENDENT DR. THOMAS ROY individually and in his official capacity as Superintendent, PATRICIA BRANDT individually and in her official capacity as President of the Board of Education, and THOMAS HORN, JR. individually and in in his official capacity as Vice President of the Board of Education, Defendants.	

An order of Hon. Arthur D. Spatt, District Judge, having been filed on December 13, 1993, granting Defendants' motion for summary judgment pursuant to Fed. R. Civ. P. 56(b), it is

ORDERED and ADJUDGED that the plaintiff George Silano by and on behalf of himself and the high school students in the Sag Harbor Union Free School District, take nothing of the defendants,

Sag Harbor Union Free School District Board of Education, Superintendent Dr. Thomas Roy; individually and in his official capacity as President of the Board of Education, and Thomas Horn, Jr., individually and in his official capacity as Vice President of the Board of Education; and that the complaint is dismissed in its entirety with prejudice.

Dated: Uniondale, New York
December 20, 1993

ROBERT C. HEINEMANN
Clerk of the Court

By: \S\

JOSEPH DI TALIA
Deputy Clerk-in-Charge

[Petitioner's Note: **PLEASE NOTE THE FOLLOWING TYPOGRAPHICAL ERRORS:** Dr. Thomas Roy was in his official capacity as "Superintendent" not "President" as the above Judgment states. "Patricia Brandt" was in her official capacity as "President". Ms. Brandt's name was totally omitted from the Judgment.]

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

MANDATE

EDNY 93-CV-1924
Spatt, J.

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 8th day of December one thousand nine hundred and ninety-four.

Present:

Hon. Ellsworth A. Van Graafeiland
Hon. Roger J. Miner
Hon. Joseph M. McLaughlin
Circuit Judges,

GEORGE SILANO, by and on behalf of himself and the high school students in the Sag Harbor Union Free School District, Plaintiff-Appellant,	#94-7025
v.	
SAG HARBOR UNION FREE SCHOOL DISTRICT BOARD OF EDUCATION, SUPERINTENDENT DR. THOMAS ROY individually and in his official capacity as Superintendent, PATRICIA BRANDT individually and in her official	

capacity as President of the :
Board of Education, and THOMAS :
HORN, JR. individually and in :
in his official capacity as :
Vice President of the Board of :
Education, :
Defendants-Appellees. x

Appeal from the United States District Court for the Eastern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Eastern District of New York and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ORDERED, ADJUDGED, AND DECREED that the judgment of the District Court is affirmed in accordance with the opinion of this Court with costs to be taked against appellant.

GEORGE LANGE III, Clerk

By: \S\

Edward J Guardaro,
Administrative Attorney

Issued as Mandate 03/30/95

APPENDIX F

SAG HARBOR UNION FREE SCHOOL DISTRICT
RR2, Box 11, Hampton Street
Sag Harbor, NY 11963
(516) 725-5300
FAX (516) 725-5307

EXECUTIVE ORDER

To: Mr. George Silano, Member
Sag Harbor Board of Education

From: Thomas Roy
Superintendent of Schools

Date: February 18, 1993

Given that you have shown poor judgment in your selection of materials presented to 10th grade youngsters and that the public controversy surrounding that incident has detracted from teaching and administrative time as well as the community respect for our school, our staff, our administrators, and your colleagues on the Board of Education;

I hereby order that you not be present in the classrooms or hallways of our school buildings during the hours of school attendance beginning on Monday, February 22, 1993 and continuing for the remainder of this school year.

Any change in this Executive Order will be considered only through petition to the Board of Education and the Board directing the Superintendent to modify or terminate the order. NB: As a member of the Board of Education you certainly have access to the rooms normally referred to as the Central Office and also access to school events and functions such as sporting events, plays, musical performances, etc.

/S/

TR/mlb

cc Members, Board of Education
John Luciano, High School Principal
Joan Frisicano, Elementary Principal
Dan Alvino, Special Education

APPENDIX G

DATE: February 22, 1993

KIND: Regular Monthly Meeting

PLACE: High School Auditorium

MEMBERS PRESENT: Mrs. Brandt, Mr. Remkus, Mrs. Semlear, Mr. Horn, Jr., Ms. Wands, Mrs. Sheehan

MEMBERS ABSENT: Mr. Silano

OTHERS PRESENT: Dr. Roy, Superintendent; Mr. Luciano, Secondary Principal; Mrs. Frisicano, Elementary Principal; Mrs. Ficorilli, District Clerk; Mrs. Sanchez, Administrative Assistant; Ms. Bennett, District Treasurer; Various Teachers; Various Citizens and Members of the Press.

President Brandt called the meeting to order at 7:33 P.M. with the Pledge of Allegiance.

The District Clerk read a statement from Silano, asking the board to postpone any action or discussion in regard to Mr. Silano's classroom visit.

President Brandt read the School Attorney's opinion in regard to Mr. Silano's lecture in a High School Classroom, and offered the following resolution;

WHEREAS, Board member George Silano was granted the authority to lecture a High School mathematics class; and,
WHEREAS, Board member George Silano exhibited poor judgment in distributing a film strip which evidenced nude actors; and
WHEREAS, the actions and deportment of members of the Sag Harbor Board of Education are expected to be above reproach in all dealings relating to the carrying-out of board responsibilities and authorities.
NOW, THEREFORE, IT IS HEREBY RESOLVED:
a) that the action of Board member George Silano occurring within the High School mathematics class on February 4, 1993 is deemed as improper and representative of poor judgement on the part of Board member George Silano;
b) that Board member George Silano is censured by the Board of Education for the lack of judgement evidenced by way of the distribution of the subject film strip; and
c) that it is expected that Board member George Silano will, in the future, exhibits the appropriate conduct and judgement warranted in all matters relating to School District or Board of Education affairs.

APPENDIX H

POLICY 1989 3210
Community Relations

Subject: Visitors to the School

The Board of Education and staff of the School District welcome members of the community and other interested persons to visit the schools. School improvements often come from suggestions originating in such visits. ...

... All visitors shall be required to report to the main office upon arrival at school to "sign in" and to explain their presence. Visitations to classrooms for any purpose require permission in advance from the building principal in order to allow teachers the opportunity to arrange their schedules to accommodate such requests. ...

Education Law Sections 1708 and 2801
Sections 140.10 and 240.35 of the Penal Law
Chapter 689 of the Laws of 1979

Supreme Court, U.S.
FILED
MAY 26 1995
CLERK

No. 94-1799

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

GEORGE SILANO, by and on behalf of himself and
the high school students in
the Sag Harbor Union Free School District,

Petitioner,

v.

SAG HARBOR UNION FREE SCHOOL DISTRICT BOARD
OF EDUCATION, SUPERINTENDENT DR. THOMAS ROY,
individually and in his official capacity as Superintendent,
PATRICIA BRANDT, individually and in her official capacity
as President of the Board of Education, and
THOMAS HORN, JR., invididually and in his official
capacity as Vice President of the Board of Education,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

Can defendant school authorities be liable in damages under 42 U.S.C. §1983 to plaintiff school board member for criticizing his judgment and temporarily limiting his access within the high school building as a consequence of his circulating during a "guest lecture" a sexy celluloid depicting an unclothed female, and others, which prominently featured her breasts, to a co-educational tenth grade math class where there was no pedagogical point or purpose to the use of this particular visual aid?

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No. 94-1799

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

GEORGE SILANO, by and on behalf of himself and
the high school students in
the Sag Harbor Union Free School District,

Petitioner,

v.

SAG HARBOR UNION FREE SCHOOL DISTRICT BOARD
OF EDUCATION, SUPERINTENDENT DR. THOMAS ROY,
individually and in his official capacity as Superintendent,
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capacity as Vice President of the Board of Education,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

STATEMENT OF THE CASE

A. The Lecture.

This case concerns actions taken by the Sag Harbor School Board and Superintendent Thomas Roy in connection with an incident that occurred on Thursday,

February 4, 1993. Petitioner George Silano, a member of the School Board and a self-styled film maker, was guest lecturing that day to a tenth grade co-educational math class. To illustrate the phenomenon known as "persistence of vision," he handed out six celluloid film strips, one of which portrayed frontal above-the-waist female nudity. After an investigation, on February 18, 1993, Superintendent Roy imposed limited restrictions on Silano's access to school facilities for the balance of the school year and on February 22, 1993, the Board passed a resolution criticizing Silano for his "poor judgment" and "censuring" him.

The genesis of Silano's math class visit was a Board meeting at which math teachers expressed concern about students' difficulty with math. In response, Silano offered to lecture on how film relates to math and arrangements were made for Silano to visit and make presentations to three math classes. Silano decided to bring materials to aid him in his presentations and selelcted 35 mm. film clips from a 30-year old film. These were the only 35mm. film clips he had and he took all of them. Although Silano also had 16mm. film clips, he decided the 35mm. clips were larger and easier to view.

One of the six 35mm. clippings in question depicts men and women from the waist up, unclothed and seated together. The breasts of the woman closest to the camera are clearly visible and prominently in view. The breasts of a second woman farther from the camera are less prominent.

The first of the three classes visited by Silano was a co-educational tenth grade math class. About half way through the lecture, Silano handed the film clips out and they were passed around the room. At the conclusion of the lecture, Principal John Luciano, who had been

present for the guest presentation, advised Silano that the film clip portraying frontal female nudity should not be distributed in the course of Silano's presentations to the remaining two math classes. Silano agreed.

B. The Apology.

On Monday, February 8, 1993, Silano apologized in writing to the entire tenth-grade math class. Silano conceded that the display of nudity may have been inappropriate. He also acknowledged that some students may have considered the film to have been provocative. In its entirety, the letter stated:

> It seems that one of the sample strips of film I used last week in your class was *inappropriate* for the topic under discussion.
>
> Since some of the small group of students who saw this film strip may have thought it *provocative* [sic], please tell them I'm sorry that I used it in trying to make my topic easier to understand.
>
> I enjoyed visiting your class and hope the students gained important knowledge about the way film is used to create the illusion of motion (emphasis added).

C. The Superintendent's Order.

On February 18, 1993 Superintendent Roy barred Silano from visiting the schools during school hours for the balance of the school year. Silano was allowed, however, continued access to the central office in order to carry out his Board of Education duties. He was also allowed to attend sporting events and other school functions.

D. The Resolution of the School Board.

At a meeting of the Board held on February 22, 1993, a resolution criticizing Silano's poor judgment in showing the film clip, directing him to comport himself appropriately in the future, and censuring Silano for his conduct, was unanimously adopted.

E. Silano's Education Law §310 Appeal.

Silano appealed Superintendent Roy's action and the Board's action to the New York State Commissioner of Education pursuant to New York State Education Law §310. The Commissioner's decision, rendered July 22, 1993, sustained the appeal only to the extent of striking the one paragraph of the Board resolution that formally "censured" the petitioner on the technical ground that the "censure" of a fellow board member, like a "reprimand," was beyond the statutory power of a school board. On the other hand, the Commissioner agreed that school board members may criticize each other for poor judgment. Therefore, all other portions of the resolution were upheld. In addition, the Commissioner upheld the limited restrictions imposed by Superintendent Roy on Silano's access to school facilities reasoning that, as a board member, Silano had no special rights of access under State law that supplemented whatever public access was afforded to the community at large.

F. District Court Proceedings.

Prior to receiving the Commissioner's decision, Silano filed an 89 paragraph, 29 page complaint alleging, among other things, that Superintendent Roy's order and the Board of Education's resolution violated his First Amendment right of free speech and his Fourteenth Amendment

due process rights under 42 U.S.C. §1983. It was during this litigation, *and not before,* that Silano first asserted that the controversial film clip demonstrated the equal rights of men and women to appear together barechested.

The District Court granted summary judgment to defendants dismissing the complaint. The Court held that Silano's First Amendment rights were not violated because: (a) a public school classroom is not a public forum for First Amendment purposes, (b) a local School Board has broad discretion in curriculum management and is entitled to control a school's curriculum, and (c) the subject of Silano's lecture had nothing to do with the alleged equality of the sexes. The District Court also dismissed Silano's due process claims holding that Silano was not deprived of a property or liberty interest and that any injury sustained was to his reputation only.

G. Court of Appeals Proceedings.

The Court of Appeals affirmed in all respects in an expanded opinion that accepted the reasoning of the District Court.

REASONS FOR DENYING THE PETITION FOR A WRIT OF CERTIORARI

Although framed by petitioner as a case involving issues of First Amendment free speech and Fourteenth Amendment due process, no expressive conduct or activity actually occurred, thereby vitiating any alleged constitutional violations. In addition, the core issues raised by the instant petition have been recently visited and revisited by the Supreme Court in *Jeffries v. Harleston,* 21 F.3d 1238 (2d Cir. 1993), *cert. granted, vacated and remanded,* ___ U.S. ___ (1994) and in *Waters v.*

Churchill, 511 U.S. ___ (1994). The petitioners have also failed to show any of the reasons set forth in Supreme Court Rules 10.1(a), 10.1(b) and 10.1(c) which justify the granting of this petition. Finally, there is no conflict among the Circuits or any other basis for further review by this Court.

ARGUMENT

THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED.

A. "Conflict" Among the Circuits.

Petitioner claims that a conflict exists among the Circuits with respect to classroom speech. To support his contention, petitioner cites *Ward v. Hickey,* 996 F.2d 448 (1st Cir. 1993) as prohibiting punishment for teachers for past conduct not specifically proscribed by the school authorities. However, in discussing the extent of speech protected for teachers in the classroom, the court in *Ward* noted that "we do not hold that schools must expressly prohibit every imaginable inappropriate conduct by teachers." The court went on to say that the "relevant inquiry is: based on existing regulations, policies, discussions, and other forms of communication between school administration and teachers, was it reasonable for the school to expect the teacher to know that her conduct was prohibited?" 996 F.2d at 454.

In this case, Silano, as a Board member, should have known that a film clip depicting above-the-waist female frontal nudity was an inappropriate teaching aid for a co-educational tenth grade math class and, consequently, school authorities were reasonable in their expectations

that such conduct would not be exhibited and reasonable as well in their subsequent reactions. Moreover, Silano *fully admitted* the inappropriateness of his conduct in his letter of apology.

B. The First Amendment Claim Has No Merit.

The Court of Appeals correctly reasoned that: (a) no expressive conduct or activity occurred as there was no classroom discussion or any classroom reference to the subject of gender equality, (b) school officials may limit the content of school sponsored speech so long as such restrictions are based upon a legitimate pedagogical concern, and (c) Silano's activity as a guest lecturer was curricular in nature, and therefore did not require that clearly established rules and procedures be in place in order to regulate the curriculum.

Here, Silano was teaching a mathematics c.ss and was demonstrating the relevance of mathematical principles to film making. He discussed the "persistence of vision," a phenomenon in which the brain converts a series of statis images case in rapid succession upon the retina into a perception of motion. As a visual aid, Silano displayed celluloid strips of film on which the students could see that a "motion picture" is actually made up of individual frames, each one of which is a still picture.

The celluloids were displayed to the class for their physical characteristics – the size of each frame, the number of frames per foot, the static nature of each frame and the sequential variation in the images from frame to frame. Silano was not lecturing about the subject of his film. There was no discussion, prior to class or after class, concerning any of the issues that

might broadly be referred to as "chest equality" which he subsequently claimed constitute the protected expression that allegedly motivated the Superintendent and Board members to take the actions challenged.

Indeed, the First Amendment claim raised herein is entirely pretextual in the sense that the gender equality issues were conjured up by Silano after the fact to retaliate against criticism of his inappropriate conduct, conduct for which he himself apologized in writing. This is vividly demonstrated by the fact that after his initial lecture, Silano gave two other lectures to math classes during which he did not use the controversial celluloid film clip and his speech and interaction with the students was neither inhibited nor restricted. Thus, Silano was not engaged in expressive activity and, accordingly, there could be no First Amendment violation.

Even assuming, *arguendo,* that Silano's activity could be broadly construed as expression, the Court of Appeals correctly applied the standards set forth in *Hazelwood School District v. Kuhlmeier,* 484 U.S. 260 (1988) in defining the parameters of limitations placed upon his speech. In *Hazelwood,* the Court held that school authorities may limit school sponsored speech "so long as their actions are reasonably related to pedagogical concerns." 484 U.S. 273.

Here, there was no legitimate pedagogical purpose to circulating a film clip depicting frontal above-the-waist female nudity as there was no pedagogical purpose to the act at all. By Silano's own admission:

- the planned subject of his presentation was relating math to filmmaking through the 'persistence of vision' phenomenon;
- Silano chose six particular film clips as visual aids because they constituted all of the 35mm. film

clips he had in his home, without reference to the subject of the film or the particular scenes portrayed in the clips and he wanted 35mm. film because of the larger frame size and ease of use;

- there was no discussion or even reference to the subject of nudity and women's breasts, gender neutrality or a woman's right to appear bare-breasted under circumstances in which a man appears barechested;
- the students asked no questions about the breast scene film clip; and
- Silano conducted two subsequent presentations without the breast scene film clip which, by his own admission, were just as successful in making the points which he intended to make.

Accordingly, there was no pedagogical purpose to circulating the Birth Scene film clip among the students in their tenth grade math class. Thus, applying the *Hazelwood* standard, the Court of Appeals held that the undisputed facts showed that the actions of the school officials were reasonably related to legitimate pedagogical concerns.

C. The Absence of a School Policy Regulating the Curriculum Does Not Alter the Result.

The Court of Appeals also correctly held that, as a guest lecturer, Silano should be afforded no greater rights than a teacher. Thus, applying the standards of *Hazelwood,* school officials had the discretion to decide the appropriateness of materials used in the classroom. In *Hazelwood,* the Court specifically held, with respect to curriculum, to require prior publication of regulations "could unduly restrain the ability of educators to educate." 484 U.S. at 273, note 6.

Thus, contrary to petitioner's contentions, *Hazelwood* reaffirms the principle that school authorities can regulate speech in the classroom without requiring prior regulations, guidelines or policies.

D. The Due Process Claim Has No Merit.

Superintendent Roy's order and the Board's subsequent censure of Silano did not deprive him of any property or liberty interests protected by the Due Process Clause of the Fourteenth Amendment.

Constitutionally protected liberty or property interests are created and defined by state law. *Paul v. Davis,* 424 U.S. 693, (1976); *Board of Regents of State Colleges v. Roth,* 408 U.S. 564, 577 (1972). Here, neither the Superintendent's order nor the Board's resolution implicated either a liberty or property interest protected by the Constitution as Silano failed to put forth any evidence showing that the challenged actions impaired any legal right or status other than, perhaps, damage to his reputation. Further, under state law, Silano did not have an unrestricted right to enter school property during school hours. *Matter of Bruno,* 4 N.Y.S. Ed. Dept. Reports 14, 17, 18 (1964), *Matter of Keyser,* 15 N.Y.S. Ed. Dept. Reports, 471, 474 (1976). This rule was reaffirmed in the Commissioner's decision in this very case resolving Petitioner's Education Law §310 appeal.

Petitioner premises his denial of liberty and property interests upon school policy 3210 which encouraged visitors in the schools, providing that visitors signed in in the main office, explained their presence, and obtained permission before visiting any classrooms. As correctly stated by the Court of Appeals, the creation of a constitutionally protected liberty interest requires "the repeated use of explicitly mandatory language in con-

nection with requriing specific substantive predicates." *Pernell v. Lord,* 952 F.2d 679, 684 (2nd Cir. 1992); *Hewitt v. Helms,* 459 U.S. 460, 472 (1983). Thus, the Court of Appeals correctly reasoned that school policy 3210 gave school officials discretion in allowing visitors into the school and did not contain any mandatory language which would vest the public with a protected liberty interest in visiting the schools.

CONCLUSION

Petitioner is entitled to his opinion, expressed during his deposition, that "there is no difference between an earlobe and an elbow or a breast" and the idea that women should be expected to cover their breasts under circumstances in which men are not expected to cover their chests evinces socially archaic notions of behavior and even gender discrimination. Here, however, his distribution to a co-educational mathematics class of a film clip depicting frontal above-the-waist female nudity was entirely gratuitous, serving no pedagogical purpose, not constituting "communicative expression" and for which he apologized in writing.

This is a case about nothing more than petitioner's hurt feelings at being publicly criticized for his admittedly inappropriate classroom conduct and it is a case which trivializes the majestic protection of the First Amendment. The writ of certiorari should be denied.

Respectfully submitted,

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